VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP601/2017

CATCHWORDS

Claim not subject to the *Domestic Building Contracts Act 1995*. Jurisdiction found under the *Australian Consumer Law and Fair Trading Act 2012*. Whether a party, with a right to terminate upon repudiation, is entitled to automatically retain deposit, where not expressed as a contractual right: *Fiorelli Properties Ltd v Professional Fencemakers Pty Ltd* considered and applied. What constitutes a deposit, and a party's ability to claim on a pre-payment upon proof of loss: *Baltic Shipping Co v Dillon*. Difficulty of assessing damages, burden of proving damages and ability of court to make inferences as to damages: *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Ltd; Commonwealth v Amman Aviation Pty Ltd*.

APPLICANT	Michael Buras
RESPONDENT	Danla Pty Ltd trading as Four Seasons Fencing and Home Services
WHERE HELD	Melbourne
BEFORE	MJF Sweeney, Member
HEARING TYPE	Hearing
DATE OF HEARING	13 July 2017
DATE OF ORDER	24 July 2017
CITATION	Buras v Danla Pty Ltd (Building and Property) [2017] VCAT 1089

ORDER

1 The claim of the applicant is dismissed.

2 The respondent is entitled to retain the sum of $5,982.50 paid to it by the applicant.

MJF Sweeney
Member

APPEARANCES:

For Applicant	In person
For Respondent	Mr Peter Gray, Manager

REASONS

1 Michael Buras and Danla Pty Ltd, trading as Four Seasons Fencing and Home Services, entered into discussions for the construction of a retaining wall in the rear area of Mr Buras's property in Burnside. A draft agreement in the form of a quote was signed by the parties on 6 December 2016 (Quote). The Quote described the works as the excavation of 40 cubic metres of soil, hire of an excavator, provision of drainage and construction of a retaining wall using wooden sleepers set into galvanised steel posts concreted into the ground.

2 The Quote noted two alternative methods of construction. The first method provided for a retaining wall with a 2.1 metre span between each of the vertical posts of the wall, for a cost of $9,614 plus $1,100 for soil excavation (Option 1). Option 1 with GST was $11,785.40. A second, alternative method, provided for a 1.8 metre span between each of the vertical posts of the wall, for a cost of $10,936 plus $1,100 for soil excavation (Option 2). Option 2 with GST was $13,239.60.

3 Two alternative methods were described and priced in the Quote because Mr Buras had concerns about the appropriate span distance between the posts and had not resolved his preference at the time of signing the Quote on 6 December 2016. As a consequence, no subtotal or total price with GST was specified in the spaces provided for on the Quote form, as the final price to be agreed depended on reaching agreement with Mr Buras as to the appropriate span distance.

4 Mr Gray, representing Danla, and Mr Buras continued their discussions, which included the advice of a sub-contractor undertaking the building labour, Travis, about the appropriate span between the posts. The discussions resulted in agreement that the draft agreement contained in the Quote be amended by removing the identification of separate costings/pricing for the alternative methods of construction and removing the separately identified cost of excavation. In place a single lump sum price of $10,500, including GST, was agreed and inserted as the total price (Agreement).

5 The Agreement was reached on or about 8 December 2016, being the date that Mr Buras paid a 50% deposit in the amount of $5,250.[1] The amount of the 50% deposit is clearly referable to the total lump sum price of $10,500. Payment terms under the Agreement, specified at the foot, '50% deposit upon acceptance.'

6 The Agreement was more formally recorded by amendments being made to the Quote by striking a line through each of the separate cost breakdowns for both methods of construction and excavation cost. In place of all costings/pricing was written a single lump sum price of $10,500, including

[1] Email from Mr Buras to Danla, 8 December 2016, confirming 50% deposit paid in the amount of $5,250.

GST. However, no deletion was made in the description of the works such that both the methods of construction remained, even though only one single lump sum price was written in the total box.

7 The deletions and the insertion of the single lump sum price into the Quote reflecting the Agreement were each initialled by Mr Gray on 11 December 2016. The work began a few days later on 16 December 2016.

8 On or about 19 or 20 December, Mr Gray requested that Mr Buras pay a further amount of $732.50 for the additional cost of excavation undertaken by Bell Earthmoving. Mr Gray said he had budgeted on a cost of '$1,000 including GST from the original budget'[2] but that due to site conditions the cost ended up being $1,732.50.[3] Mr Gray said that because of the large discount given to Mr Buras for the job, he could not absorb this extra cost, and needed Mr Buras to pay this additional amount.

9 In an email from Mr Gray to Mr Buras on 20 December 2016, Mr Gray gave a fulsome description of the context of how the Agreement was arrived at, the heavily discounted nature of the job and that the price of $10,500 was offered to him because that was the most that Mr Buras wished to pay, following an earlier unrelated bad experience of Mr Buras with an allegedly rogue contractor.

10 Following the above, Mr Buras agreed and paid Danla the additional amount for excavation on 21 December 2016.[4] This was in effect a variation to the lump sum price agreed.

11 The parties' dispute arose in the period commencing around the day after Boxing Day 2016. Up to this point, earth works had been done including removal of soil, delivery of sleepers and steel posts to site and labour to the point where construction of the retaining wall was ready to start.

12 The dispute concerns which method of construction had been agreed, construction using span distance of 2.1 metres or a span distance of 1.8 metres. Mr Buras said the span that had been agreed was 1.8 metres. Mr Gray said the span was agreed as 2.1 metres. Whatever the agreement was about the appropriate span, it was made verbally, some time following the time when the Quote was negotiated and amended, becoming the lump sum Agreement, around 8 December 2016.

13 Mr Buras said that he first queried the length of the spans on or about 20 December when he raised the matter on site with the sub contractor Travis, saying that the span distance should be 1.8 metres not 2.1 metres, noting that Travis disputed any necessity for this.

14 Mr Gray said that, around 27 December 2016, when all was in place to start the construction of the retaining wall, Mr Buras sought material changes to

[2] Mr Gray, in evidence, said that his reference in the email to $1,000 was incorrect. The budgeted amount in the Quote actually states the cost as $1,100 (exclusive of GST).
[3] Email from Mr Gray to Mr Buras, 20 December 2017.
[4] Email from Mr Buras to Danla, 21 December 2016.

the scope of the works, in particular telling the sub contractor, Travis, that the span should be 1.8 metres in accordance with certain plans in Mr Buras's possession. Mr Gray gave evidence that the change sought by Mr Buras was not a small change which could be incorporated into the works, but a significant change that made it not possible to progress the job without a reassessment. This included materials already paid for and delivered to the site being redundant. Mr Gray said the plans that Mr Buras referred to on 27 December 2016, apparently as showing design for a span of 1.8 metres and other matters, were plans never sighted by him or his contractors and were not used in arriving at the Agreement.

15 Mr Gray said that, on or about 27 December 2016, Mr Buras told the contractors that no further works should be conducted and told them to leave the site.

16 Mr Gray said that, on or about 16 or 17 January 2017, he advised Mr Buras that he would not proceed further with the works under Agreement. He also said, in respect of a separate fencing agreement to be undertaken by him, that he would return the deposit paid under that fencing agreement (which is not the subject of this dispute) but retain the deposit paid for the retaining wall works the subject of the Agreement.

17 Mr Buras disputed Mr Gray's account about returning the deposit and said that Mr Gray had agreed to return the deposit and monies paid under the Agreement for the retaining wall, and that he, Mr Buras, would give an allowance for certain costs for materials already delivered and $1,000 towards (part) costs of excavation.

18 Mr Buras' submission is that, by refusing to construct the retaining wall with a 1.8 metre span, Danla has breached the Agreement and has wrongfully terminated it. He also alleges that Danla is in breach of the provisions of the *Domestic Building Contracts Act 1995* (DBC Act), as the Agreement is a major domestic building contract under the DBC Act. He claims $2,448.00 as a refund of deposit monies paid to Danla (including the extra amount referred to in paragraph 8 above), after allowing in favour of Danla the sum of $2,534 for materials delivered to the site and $1,000 for costs of excavation, but no other costs.

19 Danla's submission is that it was entitled to terminate the Agreement and, as a consequence, it was entitled to retain the deposit. Danla submitted that it suffered loss and damage by reason of the termination, including loss through having paid sub-contractors for works undertaken by them.

20 The issues in this proceeding are as follows:

(a) Whether the Amended Agreement between the parties is subject to the DBC Act;

(b) Whether Danla was entitled to terminate the Agreement;

(c) Whether Mr Buras is entitled to a refund of part of his deposit.

IS THE AGREEMENT BETWEEN THE PARTIES SUBJECT TO THE DBC ACT?

21 Mr Buras said that the DBC Act is applicable to the Agreement. He contended that:

(a) the Agreement is subject to the DBC Act and is a major domestic building contract under the Act;

(b) Danla is in breach of the DBC Act in a number of respects, including s11(1)(b), where a deposit should not exceed 10% of the contract price;

(c) Danla is in breach of the DBC Act s30(7) where, under a major domestic building contract, a builder cannot seek an additional amount, if the additional amount could have reasonable been ascertained had the builder obtained all foundation data required by s30.

22 The Agreement is not subject to the DBC Act. Section 5(1) of the DBC Act defines work that is subject to the DBC Act. Relevantly for this case, unless the works are of a nature that are referred to in sub sections (a) and (c), the works will not be covered by the DBC Act.

23 The parties agreed that the works the subject of the Agreement were not carried out as work associated with the erection or construction of a home. Further the parties agreed that the works the subject of the Agreement were not carried out in conjunction with the renovation or alteration of a home. However, in addition, there was nothing from the nature of the works as given in evidence that demonstrated that the works the subject of the Agreement was building work to which the DBC Act applies.

24 The works, as evidenced by the Agreement and consistent with the understanding of the parties, are works not associated with the construction of a home or works carried out *in conjunction with* the renovation, alteration, extension, improvement or repair of a home. The works under the Agreement are free standing works associated with the erection of a fence.

25 For these reasons, I find that the DBC Act has no application in the present proceeding. The provisions of the Act as they relate to what is defined as a major domestic building contract and other sections, including s11 and s30, have no application.

26 That does not mean however, that Mr Buras cannot bring his claim before the Tribunal. The Tribunal has jurisdiction to hear the present dispute. This arises under the *Australian Consumer Law and Fair Trading Act 2012*. Sections 182 and 184 give jurisdiction the Victorian Civil and Administrative Tribunal to hear consumer and trader disputes. The present dispute is a dispute falling within the definitions of consumer and trader dispute.

IS DANLA ENTITLED TO TERMINATE THE AGREEMENT?

27 As referred to in paragraphs 14 to 17 above, Mr Gray described the circumstances in which he advised Mr Buras of the termination of the Agreement. He said that the insistence by Mr Buras that the span agreed was 1.8 metres and some other matters, at a time when works were well underway, meant that Mr Buras was not prepared to stick with the Agreement. He said that, as a result, it was necessary to 'call it quits', meaning terminate the Agreement. Mr Gray said that another matter, apart from the issue of the span, was a reference by Mr Buras on 27 December 2016 to saying that concrete sleepers should be used. This part of the evidence was not clear.

28 In effect, Mr Buras said that Danla had no right to terminate the Agreement. He said that the Agreement, once concluded, always provided for a span of 1.8 metres and that is what Danla should have arranged for its contractors to do.

29 In support of this argument, Mr Buras referred to an email of Mr Gray to him dated 20 December 2016.[5] On page 2 of the email, Mr Buras says that Mr Gray's reference to the sum of $10,936 is a reference to Option 2 stated in the original Quote, which stated (before it was later crossed out) the cost of $10,936 if a span of 1.8 metres was used. Mr Buras said that Mr Gray's email reference to the Option 2 cost is proof that Mr Gray and Danla knew, all along, that the later verbal resolution, resulting in the Agreement, was on the basis of a span of 1.8 metres.

30 It is important to say something about the context of the above email. It was sent by Mr Gray to Mr Buras approximately a week before the issue of the span was raised on 27 December 2016. According to its content, the email was sent to Mr Buras to remind Mr Buras of what Mr Gray said he had done in making considerable efforts to do a low cost job for him. Mr Gray gave his view of the reason why the low cost of $10,500 was finally reached in the Agreement; it was because Mr Buras said he did not want to spend more than $10,500. Mr Gray said such a cost was very low in comparison to the sum of $10,936, or totalled up, $13,239.96. This is referred to in paragraph 2 above as the Option 2.

31 In my opinion, the argument of Mr Buras, to the extent it relies on his interpretation of Mr Gray's email of 20 December 2016, is using the email out of the context from which it was written and to read in a meaning and purpose for which the email was not intended. Mr Buras seeks to use the email for the purpose of proving that Danla had agreed to provide a 1.8 metre span. I do not accept this argument.

32 In my opinion, the email, given a plain reading, is an attempt by Mr Gray to try and explain the materially discounted deal Mr Buras has got. It is true that, in making a reference to the amounts of $10,936 and $13,239.96, Mr

[5] Mr Buras's exhibit 11a.

Gray has in fact referred to Option 2, the option relating to the cost of using a 1.8 metre span. It may be that the intent was to highlight the highest level of discount that Mr Buras received, but whether that was the case, I am unable to reach a conclusive finding. However, there is insufficient evidence from Mr Buras that the Agreement at a cost of $10,500 was made to build the more expensive Option 2 for a 1.8 metre span is somehow proved by the email of 20 December 2016.

33 Further, Mr Buras's argument is inconsistent with the weight of other evidence. After very price conscious discussions, Danla offered Mr Buras the lump sum Agreement at the price requested of $10,500. This price is well below both Option 1, for a 2.1 metre span, and an even greater discount to Option 2, for a 1.8 metre span. As referred to above, when the lower lump sum price was agreed, the two cost levels contained in the Quote were amended out.

34 In my opinion, the logical inference is that the less expensive Option 1 mode of construction was agreed so as to achieve Mr Buras's desire for the low cost reflected in the lump sum Agreement.

35 Moreover, Mr Gray said that the plans presented on or about 27 December 2016 by Mr Buras, apparently as showing design for a span of 1.8 metres and other matters, were plans that were never sighted by him or his contractors and that the plans were not used in concluding the Agreement. Nor, said Mr Gray, was there evidence that a span of 2.1 metres was structurally unsuitable. On balance, I accept Mr Gray's evidence on these points, including that the Agreement was for construction of a retaining wall with 2.1 metre spans. I also accept the evidence of Mr Gray, referred to in paragraph 14 above, that the changes sought by Mr Buras were material changes to the Agreement, such the Agreement could not be continued without significant change and reassessment.

36 I also accept that Mr Buras told the contractors to leave the site on or about 27 December 2016, at a time where the excavations had already been done, the required materials had already been delivered to site and the contractors were in attendance to commence construction.

37 The conduct of Mr Buras demonstrates an intention that he was no longer bound by the Agreement for the construction of the retaining wall with an agreed span of 2.1 metres. Without justification, he repudiated the Agreement by refusing to allow construction to proceed on the agreed basis and by ordering the contractors to leave the site.

38 I find that Mr Gray, for Danla, accepted the repudiation and terminated the Agreement by advising Mr Buras on or about 16 or 17 January 2017 when he said he would not continue with the works. I find that Danla validly terminated the Agreement which, in the usual course, gives Danla a right to sue for damages.

39 In the present case, Danla has not sought to make a counter claim for damages, but maintains a right to retain the sum of $5,982.50, paid by Mr Buras in the manner described above, as commensurate with the loss suffered by it.

DO THE CIRCUMSTANCES OF THE TERMINATION OF THE AGREEMENT ENTITLE MR BURAS TO A REFUND OF HIS DEPOSIT?

40 I have found that Danla was entitled to terminate the Agreement and to claim for loss suffered. The question therefore becomes, whether Danla is entitled to retain the 50% deposit of $5,250 plus $732.50 additional excavation cost paid by Mr Buras (refer paragraph 8 above), a total of $5,982.50, or whether it must be returned in whole or in part to Mr Buras.

41 Mr Buras concedes that, of the $5,982.50 paid by him, Danla is entitled to retain $2,534.50 for materials retained and $1,000, part cost of excavation (refer paragraph 18 above). Thus, the question is whether Danla is entitled to retain the balance of the amounts previously paid by Mr Buras of $2,488 or whether the claim of Mr Buras for return of this amount is validly made.

42 The right of the innocent party to automatically retain a deposit paid where the other party has wrongfully repudiated an agreement leading to termination, depends on whether the agreement expressly states it, or whether it may be implied. This in turn may depend on whether the payment can be truly characterised as a 'deposit'. If the amount paid is large in comparison to the total cost of the works, it may indicate that the payments could be more in the nature of a pre-payment.

43 In *Fiorelli Properties Ltd v Professional Fencemakers Pty Ltd and Anor*[6] (*Fiorelli*) it was held that, upon the failure of the party who paid the deposit to complete the contract, the principle relating to forfeiture of deposits for sale of real property applies to all contracts. Justice Kaye observed:

> The fundamental functions of a deposit, as described by the members of the Court of Appeal in *Howe v Smith*,[7] are equally applicable, whether or not the contract concerns the sale of real property. In any contract, a deposit constitutes an earnest, to bind the bargain, and a guarantee of due performance, of the contract, by the payee. Those two functions, of a deposit, have been long entrenched in contract law.[8]

44 If the amounts paid by Mr Buras can be properly described as a deposit, then on such authority, Danla is entitled to retain the deposit without further proof of loss.

45 The word 'deposit' was used by both the parties. Mr Buras referred to 'deposit' in his email of 8 December 2016. The Agreement refers at its foot to a '50% deposit'.

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[6] [2011] VSC 661 per Kaye J (as he then was).
[7] (1884) 27 Ch D 89.
[8] *Fiorelli*, above, [31].

46 Suffice to say, that the mere use of the word 'deposit' is not conclusive, especially in cases such as the present where the amount to be paid is calculated as 50% of the total cost of the works.

47 In *Fiorelli*, Justice Kaye referred to the decision of Mason CJ in *Baltic Shipping Co v Dillon*,[9] concerning the distinction between a deposit on the one hand, and a part payment on the other hand. The Chief Justice referred, with approval, to the views stated in *Dies v British and International Mining and Finance Corporation Limited*.[10] These views were to the effect that, where there is no express term of the contract entitling the seller to retain a payment, the law confers on the purchaser the right to recover his money, unless the language of the contract gives rise to an inference to the contrary. The following passage of Mason CJ was quoted by Justice Kaye:

> This statement [in *Dies*] in turn accords with the distinction ... between a deposit which was to be forfeited if the plaintiff should not perform the contract and a mere part payment the right to which depended upon performance of the contract. ... The question whether an advance payment, not being a deposit or earnest of performance, is absolute or conditional is one of construction.[11]

48 I am of the opinion that the sums paid by Mr Buras to Danla do not constitute a deposit, in the sense of being a payment in earnest, to bind the bargain, and guarantee due performance. As a matter of contractual construction, the payments of Mr Buras are of a size relative to the total contract price, 50%, as to be more properly considered a contractual pre-payment or down payment.

49 The consequence of my finding is that Danla is not automatically entitled to retain the amounts pre-paid merely in reliance on Mr Buras's repudiation of the Agreement giving rise to the termination. To be entitled to damages following from the termination, Danla must prove its loss.

50 The loss claimed by Danla is for materials supplied and retained by Mr Buras of $2,534.50 (which is admitted), excavation costs of $1,732.50 (of which $1,000 is admitted), $1,500 for the sub-contractor, Travis, for labour and the balance of $215.50, which I infer is claimed as administration, overhead or loss of profit.

51 Danla tendered tax invoice No.1491 of Bell Earthmoving for $1,732.50. I accept the evidence of Mr Gray that this has been paid in full and that the full amount constitutes a loss suffered by Danla arising directly from the termination based on the repudiation by Mr Buras. Mr Buras submitted that the underlying cost of the excavation stated in the Quote was $1,000[12] and that he should not have to pay, or give an allowance for, the additional overrun of $732.50. I reject this submission. I have found that the contract

[9] [1993] HCA 4; (1993) 176 CLR 344.
[10] [1939] 1 KB 724 per Stable J.
[11] *Baltic Shipping Co v Dillon* 176 CLR 344 at 352.
[12] Mr Buras submitted the amount of $1,100 in the Quote, included GST. This is disputed by Danla.

was a lump sum for the reasons previously stated. Further, the amount of $1,100 for excavation was crossed out and initialled as part of the process of agreeing the lump sum Agreement. There is no basis for seeking to unwind the lump sum Agreement made by him and rely on individual items contained in the superseded Quote. I find that Danla is entitled to be reimbursed $1,732.50 out of monies retained by it from the pre-payment made by Mr Buras.

52 In respect of the claim for labour undertaken by the sub-contractor, Travis, of $1,500, Danla did not have an invoice. Mr Gray said however that the payment had been made in cash by him personally to Travis. The absence of some invoice or receipt showing payment is unfortunate. However, having heard all the evidence, including the nature of Danla's small business and its use of personal contacts known to Mr Gray for undertaking an urgent job in the Christmas period, I accept on the balance of probabilities that Mr Gray, for Danla, did in fact make the payment. I find that Danla has suffered a loss in this amount resulting from the termination and is entitled to reimbursement of $1,500 from monies pre-paid by Mr Buras.

53 The remaining matter is the claim by Danla for the balance of monies paid by Mr Buras to Danla of $215.50. The evidence supporting this from Danla was a generalised claim for loss. The fact that assessment of damages is difficult and requires a court or tribunal to make estimations is no bar to recovery. It is trite law that, in such situations, a court must do the best it can. In *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd*,[13] Barwick CJ said:

> It is perhaps not a very satisfying answer to say that damages are not in every case a perfect compensation but in many cases no more than an approximation lacking in mathematical or economic accuracy or sufficiency. But however unsatisfying, that answer, in my opinion, must be accepted.

54 These comments were cited with approval by the High Court in *Commonwealth v Amman Aviation Pty Ltd*[14] where Toohey J said:

> However, to say as a general proposition that it is for the plaintiff to prove his damages is not to say that, in some instances, damages may not be inferred or presumed.

55 That is the position in the present matter. The evidence of Danla was that it expected to make little if any money, given the low lump sum price under the Agreement and with the job being done by sub-contractors. It can be reasonably inferred that the loss to Danla from the termination of its Agreement, when the job was already substantially underway, contains an element of loss of profit and some cost associated with overheads. Given that the amount in question is only $215.50, representing probably around 2

[13] (1981) 145 CLR 625 at 636.
[14] (1991) 174 CLR 96 per Toohey J.

or so hours of work, I am more than satisfied that such an amount is unlikely to exceed either overhead costs suffered by Danla or some loss of profit that might have accrued from the performance of the Agreement.

56 I find Danla is entitled to claim the amount of $215.50.

CONCLUSION

57 Mr Buras repudiated the Agreement with Danla, giving Danla the right to terminate the Agreement, which it did. Mr Buras has failed to establish an entitlement to recover any part of the monies paid by him to Danla. His claim is dismissed.

58 Danla validly exercised a right to terminate the Agreement. Danla is entitled to damages for loss suffered as a result of the termination of the Agreement and, on the balance of probabilities, has proved its loss in the sum of $5,982.50. Danla is entitled to retain the monies pre-paid by Mr Buras.

MJF Sweeney
Member